IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

SAMUEL W. YORTY,

Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA,

Respondent.

CITY COUNCIL OF THE CITY OF LOS ANGELES,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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File No. 146726 S-3

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Points and Authorities in Opposition to Notice of Motion for an Order Quashing Subpoena Duces Tecum

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CITY COUNCIL OF THE CITY OF LOS ANGELES,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner prays that a Writ of Certiorari issue to review the order of the Supreme Court of California denying a Petition for a Writ of Mandate to be directed to the Court of Appeal of the Second Appellate District of the State of California, and from an Order denying a Petition

for a rehearing entered in the above case on June 26, 1974.

OPINION BELOW (Unreported)

JURISDICTION

The Order of the Supreme Court of California was entered on May 29, 1974, denying Petitioners Application for an alternative Writ of Mandamus commanding the Court of Appeal to vacate its Order entered April 4, 1974 denying the Petition of the Petitioner for a Writ of Mandate directed to the Superior Court.

A Petition for a rehearing was denied by the California Supreme Court on June 26, 1974.

Jurisdiction of this Court to review the Orders below rests on Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Does the Charter of Los Angeles and an Ordinance adopted pursuant to such Charter authorizing the prosecution of witnesses who refuse to attend and produce records before a Councilmanic Committee violate the

due process clause of the Fourteenth Amendment of the United States Constitution in that neither the Charter nor the Ordinance provide for immunity to the compelled witness?

2. Does the Charter and Ordinance violate the due process clause of the Fourteenth Amendment of the United States Constitution in failing to provide for a judicial review of the refusal of a witness to answer or produce records prior to the institution of criminal proceedings against such a witness for refusal to testify or produce subpoenaed records?

3. May a witness subpoenaed to produce records before a Councilmanic Committee justify his refusal to produce the records on the ground the enforced production violates his constitutional rights under the Fourth Amendment of the United States Constitution in failing to provide for a judicial review of the refusal of a witness to answer or produce records prior to the institution of criminal proceedings against such a witness for refusal to testify or produce subpoenaed records?

4. May a witness subpoenaed to produce records before a Councilmanic Committee justify his refusal to produce the records on the ground the enforced production violates his constitutional rights under the Fourth Amendment of the United States Constitution?

5. Is Section 930 of the Evidence Code of California prohibiting the calling of a defendant in a "criminal case", applicable to a former public official subpoenaed to appear before a Councilmanic Committee investigating the alleged violations by the witness of conflict of interest and/or "election" laws?

CONSTITUTIONAL PROVISIONS INVOLVED
FOURTH AND FOURTEENTH AMENDMENTS
UNITED STATES CONSTITUTION

STATUTE INVOLVED
SECTION 63 CHARTER CITY OF LOS ANGELES

The Ordinance Involved Section 63110 of the Municipal Code, City of Los Angeles.

STATEMENT OF THE CASE

Petitioner Samuel W. Yorty filed a Complaint in the Superior Court of Los Angeles County directed against the City Council of the City of Los Angeles. The Complaint (Second Amended) alleged:

Subsequent to the termination of Plaintiff's Third term of office (as Mayor) a Committee of the Council commenced an investigation into the relationship between Occidental Petroleum Corporation and the City of Los Angeles, particularly in regard to Occidental proposals for oil drilling.

During the course of the investigation, a Committee of the Council made a request upon Petitioner to appear and testify as a witness concerning any information he may have relevant to a land exchange between Occidental and the City of Los Angeles, which was finalized in 1969 - 1970.

Petitioner appeared before the Committee. He was sworn and testified.

Thereafter, further demands were made upon Petitioner that he produce records among other things, relating in any manner

to "Communications to or from or advice given to Petitioner or any member of his family relating in any manner to the purchase, sale or holding of Capital Stock in the Occidental Petroleum Corporation."

Counsel for Petitioner responded to that demand stating:

> "Mr. Yorty has based his refusal to produce his private records concerning the purchase he has made of stock in Occidental Petroleum Corporation which purchases originated more than ten years ago, on the ground that such production would violate certain fundamental rights of personal privacy and the guarantee to be free from demands which are repugnant to Constitutional privileges.
>
> "The Fourth Amendment of the United States Constitution, independent of the Fifth Amendment, provides an inalienable right of protection against official harassment. Under the Fourth Amendment, neither an enforcement officer nor a City Council Committee, may invade

the privacy of an individual. It is a Constitutional right to enjoy and defend one's privacy and to be left alone."

The City Council of the City of Los Angeles authorized the issuance of a subpoena duces tecum to compel Petitioner to produce certain documents and to appear before a Committee with such documents for further testimony.

A subpoena was thereafter issued and served upon Petitioner.

Petitioner filed an action in the Superior Court directed against the City Council of the City of Los Angeles. Petitioner alleged that a subpoena duces tecum served upon him violated the Fourth Amendment of the United States Constitution, the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment and Article 1, Section 19 of the California Constitution.

Petitioner alleged:

"The Fourth Amendment and the Fourteenth Amendment of the United States Constitution and Article 13 and

19 of the California Constitution apply to compulsory subpoenas. (3) A Subpoena that is overbroad and or limitless as to time constitutes a violation of the Fourth Amendment and of Article I, Section 19 of the California Constitution. (4) The compulsory production of a person's private papers to establish a criminal violation is within the scope of the Fourth Amendment and Article I, Section 19, of the California Constitution, respectively."[1/]

Petitioner prayed for the following relief: That the Court declare the respective rights and duties of the parties under the subpoena duces and by said declaration and judgment it be declared that said subpoena is void in that it violates the following provisions of the California and United States Constitutions:

1/ The California Supreme Court has construed Article II, Section 19 of the California Constitution as essential identical to the rights under the Fourth Amendment. People v. Triggs, 8 Cal.3d 884, 892 Footnote.

(a) The Fourth Amendment of the United States Constitution and Article I, Section 19 of the California Constitution;

(b) The Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 13 of the California Constitution.

The Superior Court made an order granting Petitioner a preliminary injunction modifying partially the subpoena duces tecum.

The Superior Court made a further order denying Petitioner's Application for a preliminary injunction to enjoin the enforcement of the subpoena duces tecum with reference to subsections 1, 2, 3, and 5.

The Petitioner applied to the Court of Appeal for a Writ of Mandamus to command the Superior Court to make an order quashing the subpoena duces tecum and to enjoin the City Council from enforcing the provisions of the subpoena duces tecum.

(15)Petitioner alleged he did not have a right of appeal from the Order denying the Motion to quash the subpoena duces

tecum and such an order is reviewable to an Appellate Court by a Petition for a Writ of Mandamus.

The Court of Appeal denied the Petition without opinion.

In a supporting brief, Petitioner argued:

1. The Fourth Amendment applies to compulsory subpoenas. (Petitioner cited the following cases: Hale v. Henkel, 201 U.S. 43; Fed. Trade Com. v. American Tobacco Company, 264 U.S. 298; Brown v. United States, 276 U.S. 134; Watkins v. United States, 354 U.S. 178.)

2. The Subpoena Duces Tecum is so broad and so limitless as to time that it constitutes a violation of the Fourth Amendment.

3. The Compulsory Production of a Person's Private Papers to establish a criminal violation is within the scope of the Fourth Amendment. (Petitioner cited the following cases among others: Murphy v. Waterfront Comm., 378 U.S. 52; Borror v. Department of Investment, 15 Cal.App.3d 531, 542; In re Gault, 387 U.S. 1; McCarthy v.

Arndstein, 266 U.S. 34, 40; United States v. Saline, 1 Pet. 100; 58 Am. Jur. Witnesses Sec. 36.

4. An Investigating Committee may not assume a power which can only be exercised by another branch of Government.

5. The Subpoena of Personal Communications between Plaintiff and Dr. Armand Hammer, President of Occidental, is not in aid of a proper legislative purpose. Petitioner cited among other cases, Gibson v. Florida Investigation Committee, 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889.

6. The Production of Records concerning the amount of stock owned or possessed by Plaintiff would not serve a valid legislative purpose. Petitioner cited Section 1091.5, Government Code.

In the Petitioner's reply to Points and Authorities filed by the City Council, Petitioner argued, among other things:

The privilege contained in the Fourth Amendment may be raised without citing the Fifth Amendment.[2] Petitioner cited Mancusi v. De Forte, 392 U.S. 364 (1968).

Petitioner also argued that a Motion to Quash may be based on the First, Fourth or Fifth Amendments citing Gebhard v. United States, 408 U.S. 41; Hale v. Henkel, 201 U.S. 43; Silverthorne v. United States, 251 U.S. 385.

The Court of Appeal rejected Petitioner's contention that the Fourth Amendment privilege was available in a legislative investigative proceeding.[3]

2/ This concept is developed in a law review article. 13 U.C.L.A. Law Review, 857, 864 (1966) citing, among other cases: Silverthorne Lumber Co. v. United States, 251 U.S. 385; Hubner v. Tucker, 245 F.2d 35 (9th Cir.); Schurmmer v. United States, 232 F.2d 855 (8th Cir.).

3/ The Fourth Amendment exempts no branch of the Federal Government from the commandment that "The right of the people to be secure in the persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." This constitutional guaranty applies with equal force to executive, legislative and judicial action. See discussion in McGeary, Congressional Investigations: Historical (Continued)

Petitioner filed a Petition with the California Supreme Court entitled "Petition for Writ of Mandamus. Petitioner prayed that the Supreme Court assume jurisdiction of the case, and after assuming jurisdiction grant Petitioner a Writ of Mandamus commanding the Court of Appeal to vacate its Order denying the Petition of Petitioner for a Writ of Mandate directed to the Superior Court, that the Supreme Court further command the Court of Appeal to issue an order to the Superior Court to quash the subpoena duces tecum and to enjoin the City Council from enforcing the provisions of the subpoena duces tecum served upon Petitioner by the City Council.

The Supreme Court denied the Petition for a Writ of Mandamus.

The Petitioner filed a petition for a rehearing. The Petitioner argued:

3/ Continued:

Development, 18 Chi. L. Rev. 425, 434 (1951); and see Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 101 et seq. (1937).

"Neither the ordinance nor the Charter contain provisions for a judicial hearing before criminal prosecution of a witness may be instituted. The failure to include such a procedure renders the ordinance void on its face in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

"* * * that the ordinance violated both the statutory and constitutional privileges of a witness subpoened to testify as to purported violations of criminal law without provision in such ordinance for transactional immunity."

The Supreme Court denied the Petition for a rehearing.

HOW FEDERAL QUESTIONS ARE PRESENTED

The federal questions were presented as follows:

(a) In the Complaint (Second Amended) filed with the Superior Court. (Appendix A Petition for Writ of Mandamus filed in

Court of Appeal.)

(b) At the oral argument before the Superior Court. (Reporter's Transcript of proceedings Appendix G, pp. 4 through 19, unnumbered.)

(c) In the Court of Appeal (Petition for Writ of Mandamus, page 2, paragraph 5).

(d) In the Supreme Court (Petition for Writ of Mandamus, pp. 5, 6, and 7, paragraphs 14, 15, 17, 20, 22.

(e) In the Petition for Rehearing filed with the California Supreme Court (pp. 1 through 9, inclusive).

ARGUMENT

I

A CHARTER OF A MUNICIPALITY AND A SUPPORTING ORDINANCE WHICH PROVIDE FOR THE COMPELLED PRODUCTION OF DOCUMENTS WITHOUT GRANTING TRANSACTIONAL IMMUNITY VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Neither the Charter of Los Angeles nor the ordinance upon which the City Council relies provides that any witness called to testify shall be given immunity against

criminal prosecution.[4/]

Nor has the Petitioner conceded that a City Council may by ordinance arrogate to itself the power to cause an arrest and prosecution of a witness who refuses to appear and produce his records.

The customary process for enforcing an administrative subpoena originated with the creation of the Interstate Commerce Commission in 1887. (Ch. 104, Sec. 12, 24 Stats. 379 (1887).) The Act to investigate Government Aided Railroads contained the same provisions for subpoena enforcement. (Ch. 345, 24 Stat. 488 (1887).)

The City Council, in resisting the Petitioner's Application to enjoin the enforcement of the subpoena duces tecum have assumed the ordinance constitutionally permits the prosecution of a witness who refuses to produce documents before a Council Committee. No such procedure has been provided for by the ordinance under which the City Council is proceeding, or by the

---

4/ The Real Party, despite the fact that it had the burden of proof in this proceeding failed to present the ordinance to the Court of Appeal.

Charter of the City of Los Angeles.

The Council in adopting the ordinance which it seeks to enforce against Petitioner did not provide in such ordinance for a judicial determination of the constitutional privileges asserted by a witness.

In Jones v. S.E.C., 298 U.S. 1, 27, the Court quoting from an earlier decision as to the right of an administrative agency to seek subpoena enforcement said:

> "A general, roving, offensive, inquisitorial, compulsive, investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end."

To the extent that the Charter of the City of Los Angeles may be deemed to have given the City Council authority to conduct investigations, this authority is subject to the constitutional and statutory privileges accorded witnesses or prospective defendants. This privilege by the same expanding constitutional philosophy was applied to the Fourth and Fifth Amendments by the United States Supreme Court in United States v. Boyd, 116 U.S. 616; Counselman v. Hitchcock, 142 U.S. 547 (1891); McCarthy v. Arndstein, 266 U.S. 34, 40 and other cases.

The Charter did not attempt to authorize a Committee to conduct an investigation without regard to the constitutional privileges of the witnesses called before it.

The Charter failed to provide for a judicial procedure to determine whether the statutory or constitutional privileges were validly interposed.

The City Council has assumed that the mere failure of a subpoened witness to appear or to produce records vests jurisdiction in the Council to order the arrest and prosecution of the witness.

The California Supreme Court upheld the contention a legislative body may not be challenged under the First or Fourth Amendments.

II

A MOTION TO QUASH A SUBPOENA OR TO WITHHOLD EVIDENCE FROM A COMMITTEE MAY BE BASED ON THE FIRST AND FOURTH AMENDMENTS EQUAL WITH THE FIFTH AMENDMENT

The privilege contained in the Fourth Amendment may be raised without citing the Fifth Amendment.

In Mancusi v. DeForte, 392 U.S. 364 (1968), no reliance was made on the Fifth Amendment. Respondent's brief on file in that case reads in pertinent part:

> "Respondent, as discussed, has not relied on the protection of the Fifth Amendment. Rather, respondent seeks suppression because the Fourth Amendment prohibits illegal actions conducted by the State authorities. While there may be 'an intimate relationship' between the Fourth and Fifth Amendments, Boyd v.

United States, 116 U.S. 616, 633, 'the philosophy of each Amendment is complementary, although not dependent upon that of each other."

Mapp v. Ohio, 367 U.S. 643, 651. Therefore, even though there may have been no Fifth Amendment right to seek suppression, the Fourth Amendment standing alone protects respondent. Schmerber v. California, 384 U.S. 757. Resp. Brief, page 6.

The Supreme Court in its decision noted that the Fifth Amendment privilege had not been raised.

The Supreme Court said,

"It is desirable at the outset to make clear what is and what is not involved in this case. The decision below was based solely upon a finding that De Forte's Fourth and Fourteenth Amendment rights, see Ker v. California, 374 U.S. 23, 30-34, 10 L.Ed.2d 726, 735-738, 83 S.Ct. 1623, were violated by the search and seizure and that the seized material was therefore inadmissible under Mapp. It is on this ground

alone that DeForte argues for affirmance. Consequently, there is no occasion to consider whether DeForte might successfully have asserted his Fifth Amendment right against self-incrimination with respect to the use against him of the seized records."

III

A MOTION TO QUASH MAY BE BASED ON THE FIRST, FOURTH OR FIFTH AMENDMENTS

The Federal courts have permitted compelled testimony to be challenged on either the First, Fourth or Fifth Amendments. In Gebhard v. United States, 409 U.S. 41, the Supreme Court said,

> "The fact that the movants below sought to withhold evidence does not transform these cases into unusual ones. A witness is often permitted to retain exclusive custody of information where a contrary course would jeopardize important liberties such as First Amendment guarantees, Watkins v.

United States, 354 U.S. 178, 1 L. Ed.2d 1273, 77 S.Ct. 1173; NAACP v. Alabama, 357 U.S. 449, 463, 2 L.Ed.2d 1488, 1500, 78 S.Ct. 1163; Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889; Baird v. State Bar of Arizona, 401 U.S. 1, 6-7, 27 L.Ed.2d 639, 646-647, 2d 179, 92 S.Ct. 2357, 91 S.Ct. 702; In Re Stolar, 401 (408 U.S. 66) U.S. 23, 27 L.Ed.2d 657, 91 S.Ct. 713; Fifth Amendment privileges, Hoffman v. United States, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814, or Traditional Testimonial Privileges.

"The same is true of Fourth Amendment authority to withhold evidence, even from a grand jury. Hale v. Henkel, 201 U.S. 43, 50 L.Ed. 652 S.Ct. 370. Silverthorne Lumber Co. v. United States, 251 U.S. 385."

In DeGregory v. Attorney General, 383 U.S. 825, 16 L.Ed.2d 292, defendants conviction of contempt was reversed on the

ground that the information sought was historical and that states interest was too remote and conjectured to override guaranty of the First Amendment.

The Supreme Court said,

> "The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking. Watkins v. United States, 354 U.S. 178, 197, 1 L.ed.2d 1273, 1289, 77 S.Ct. 1173. Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy."

The City Council prevailed upon the trial court in this case to erroneously assume that the Fourth Amendment could not be relied upon in support of the petitioner's application to quash the subpoena duces tecum.

Counsel for the petitioner argued,

> "If you are going to rely on the Fifth Amendment, you have to make an appearance. If you are going to rely on the Fourth Amendment,

then you have a right to go into the Court and obtain an Order quashing or enjoining the enforcement of the subpoena and preventing the harassment that you would be subjected to by appearing and asserting your grounds at that time. You can assert the grounds prior to the actual hearing if you are relying on the Fourth Amendment.

"Even though you are saying they are trying to prove you committed a crime and they are asking you to produce your records and infer that you may have committed a crime, I believe they do not have a right to compel you to produce those records, irrespective as to whether they are, in fact, evidence of the crime under the Fourth Amendment which forbids an unreasonable search and seizure and the issuance of a subpoena duces tecum is tantamount to a search and seizure."

Counsel further argued that Section 930 was applicable to an investigation where it

is sought to establish that the witnesses being examined had committed a crime.

The trial judge rejected petitioner's contention that the privilege was available in an investigative proceeding.

The Trial Judge determined that the Fourth Amendment could not be invoked by the petitioner. The trial judge stated, "I agree with you, Mr. Silver, but you are talking about the Fifth Amendment and I am having a great deal of difficulty about following your argument because you are talking about the Fourth Amendment and you are citing Fifth Amendment cases."

A refusal by the petitioner to rely upon the Fifth Amendment does not constitute a waiver of the right to rely upon either the Fourth Amendment, Article 1, Section 19 of the California Constitution and of Section 930 of the Evidence Code. Mancusi v. DeForte, 392 U.S. 364, supra. In the Mancusi case, the Supreme Court expressly held that the Fourth Amendment could be relied upon without reliance upon the Fifth Amendment.

To the same effect is the case of Schwimmer v. United States of America, 232 F.2d 855 (8th Cir. 1956). In that case an appeal was taken from a denial by the District Court of Motions to quash two subpoenas duces tecum issued in a Grand Jury investigation. In the course of the proceedings of the Grand Jury, a subpoena was issued requiring the production of "all books and records, files, books, diaries, memoranda, correspondence, and other documents of Harry R. Schwimmer."

Gwen Schwimmer learned of the issuance of the subpoenaes, he filed a motion to quash each of them as constituting, on various grounds, an unreasonable search and seizure in violation of the Fourth Amendment. No claim of privilege against self-incrimination under the Fifth Amendment was, however, asserted by him. The Court ruled that both of the subpoenaes were reasonable and that Schwimmer (an attorney) was not entitled to have either of them quashed.

In reversing the Order of the District Court, the Circuit Court said:

"The compelled production of one's private books and papers through a

subpoena duces tecum, for use against him in a criminal proceeding, is, of course, as much within the guarantee of the Fourth Amendment against unreasonable searches and seizures as is a reaching of them by means of a warrant." The court citing Boyd v. United States, 116 U.S. 616, 622.

CONCLUSION

A legislative committee may not violate the Fourth Amendment rights of a witness subpoenaed to testify. A statute or ordinance requiring the compelled production of records before a legislative committee must contain provisions permitting a judicial review of the refusal to produce subpoened records to comply with due process of law under the Fourteenth Amendment.

A witness subpoenaed to produce records before a Councilmanic committee may justify his refusal to produce the records on the ground the enforced production violates his constitutional rights under the Fourth Amendment of the United States Constitution.

Section 930 of the Evidence Code of California is applicable to a witness subpoenaed to appear before a Councilmanic committee investigating alleged violations by the witness of conflict of interest and/or election laws. (State v. Nolan, 44 N.W.2d 66 (S.Ct. Minn.).

For all of the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted to determine the constitutional questions raised by the Petitioner in these proceedings.

Respectfully submitted,

PHILL SILVER

Attorney for Petitioner

SINCE 1908

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FILED

OCT 21 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-334

SAMUEL W. YORTY,

Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA,

Respondent.

CITY COUNCIL OF THE CITY OF LOS ANGELES,

Real Party in Interest.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SAMUEL W. YORTY, Petitioner, v. SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent.	)	2d Civ 43822 Minutes

THE COURT:

Petition for writ of mandate denied.

Date: April 3, 1974

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true and correct copy of an order of this Court, as shown by the records of my office.
Witness my hand and the seal of this Court this 30th day of [illegible] A.D., 1974
CLAY ROBBINS, JR., Clerk
By R. REEVES Deputy Clerk

Exhibit III

ORDER DENYING ALTERNATIVE WRIT

L.A. No. 30302

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

YORTY, PETITIONER

v.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, RESPONDENT

CITY COUNCIL OF THE CITY OF LOS ANGELES, REAL PARTY IN INTEREST

Petition for writ of Mandamus DENIED.

FILED

MAY 29 1974

G. E. BISHEL, Clerk

S. F. Deputy

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 30th day of September A.D. 1974

Clerk

By Deputy Clerk

Wright

Chief Justice

Exhibit IV

Crim Dus

June 28, 1974

ORDER DENYING REHEARING

L.A. No. 30302

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

YORTY, Petitioner

v.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, Respondent;
CITY COUNCIL OF LOS ANGELES, Real Party in Interest.

Petition ~~petitions~~

for rehearing DENIED.

SUPREME COURT
FILED
JUN 26 1974
G. E. BISHEL, Clerk
Deputy

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 30th day of September A.D. 1974

Clerk
By [signature]
Deputy Clerk

[signature]
Chief Justice

Exhibit V

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-334

SAMUEL W. YORTY,

Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA,

Respondent.

CITY COUNCIL OF THE CITY OF LOS ANGELES,

Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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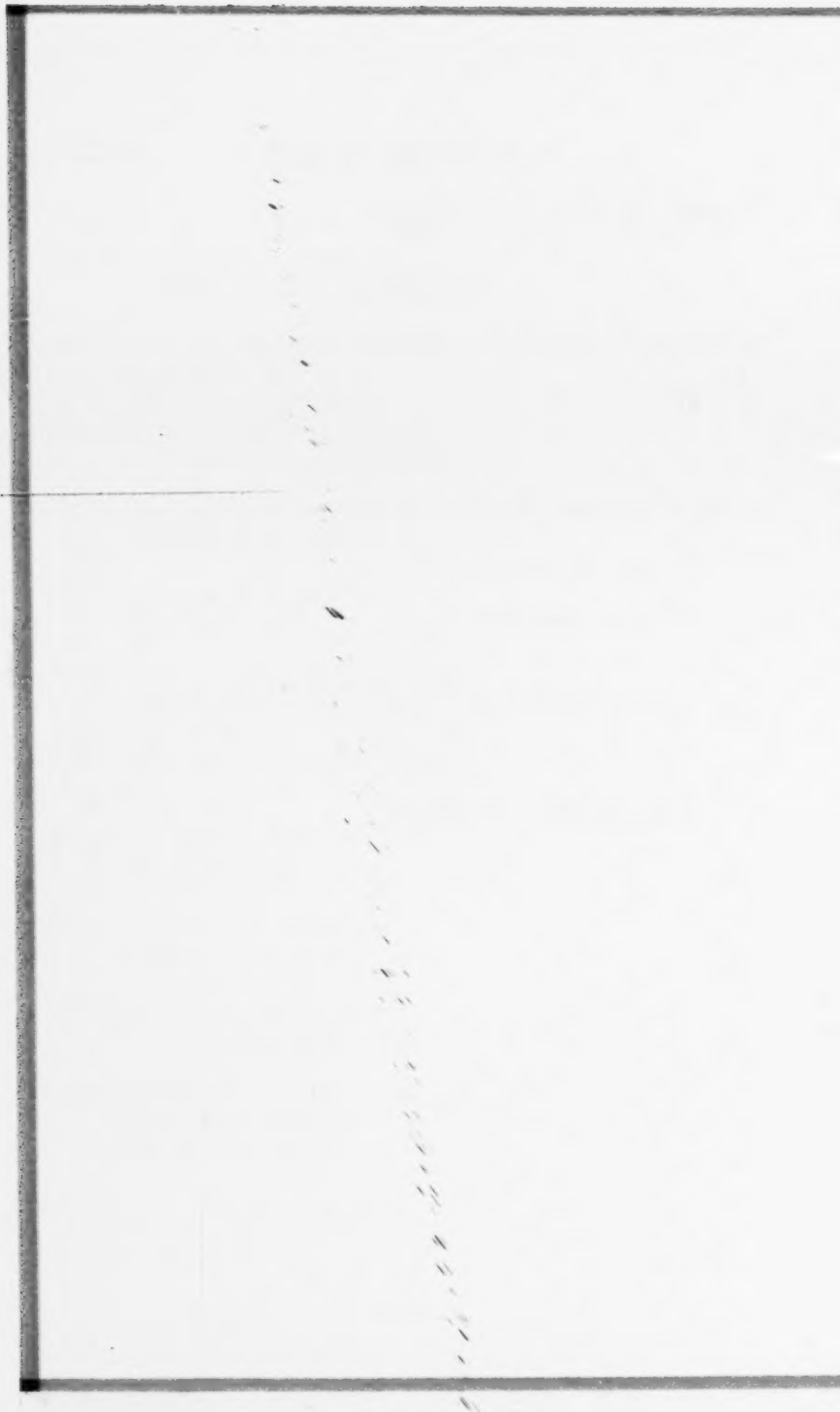

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-334

SAMUEL W. YORTY,

Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA,

Respondent.

CITY COUNCIL OF THE CITY OF LOS ANGELES,

Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

INTRODUCTION

Petitioner herein, the former Mayor of the City of Los Angeles, requests this Honorable Court to issue a Writ of Certiorari to, in effect, review the sequence of California court rulings, from trial

court through the Supreme Court, denying his request for a preliminary injunction against the enforcement of a subpoena issued by the Los Angeles City Council directing him to produce certain documents and to testify before one of its committees in connection with a legislative investigation.

Real Party in Interest, the Los Angeles City Council, has contended throughout these proceedings, and does now contend, that the subpoena in question calls for the production of relevant and material information, which is described with reasonable particularity, and to be used in a proper legislative investigation.

Petitioner has explicitly declined to produce such information on grounds other than the Fifth Amendment. (5th unnumbered page, Reporter's Transcript of Proceedings dated February 28, 1974 - a portion of Exhibit II to the Petition herein)

THE FACTS

At the outset it should be made clear that the Petitioner herein requested Respondent, the Court of Appeal, to mandate the Los Angeles County Superior Court (1) "to

make an order quashing the subpoena duces tecum" which had been issued by the Los Angeles City Council and (2) "enjoining the City Council from enforcing the provisions" of such subpoena. (Petition for Writ of Mandamus to the Court of Appeal, pg. 3 - a portion of Exhibit II to the Petition herein.) Such request was made at a time when the Superior Court had not yet even acted upon the complaint filed by Petitioner seeking to quash the subpoena, but only upon Petitioner's request to preliminarily enjoin its enforcement, pending trial of the matter (Appendix F to the Petition to the Court of Appeal). No trial to this date has yet been requested or held in the Superior Court in this matter. The Superior Court has simply conducted its hearing on the Order to Show Cause re preliminary injunction as requested by Petitioner and has made its order granting same in part and denying the balance. (Petition to Court of Appeal, p. 2, paragraph 3.)

The subject controversy arose out of an investigation by the Governmental Efficiency Committee of the Los Angeles City Council, commencing in July, 1973, into

the relationship and transactions between Occidental Petroleum Corporation and the City of Los Angeles with respect to the acquisition by Occidental from the City of land in the Pacific Palisades area of the City from which to conduct oil drilling activities, and various administrative and legislative actions relative thereto. Such transactions are more fully described in the Declaration of Robert J. Stevenson (a portion of Exhibit I to the Petition herein). As set forth in such declaration (p. 2, line 29 to p. 3, line 5) some 42 witnesses testified before, and some 304 exhibits were received by, the Committee. Such declaration further sets forth (paragraph 6) that "Mr. Yorty is the only witness in the hearings to date who has failed to answer all questions and produce all documents requested of him" (with a single minor exception); describes (paragraph 7) the legislative and other actions under consideration by the Committee for recommendation to the Council; and states (paragraph 12) that the subpoenaed documents and testimony "would be pertinent and of substantial aid and assistance to the Committee" in recommending legislative and other

action to the City Council.

Nothing in the ongoing legislative investigation or in the Stevenson declaration in any way suggests that this is a criminal investigation or that Petitioner is the target thereof. Such assertions come only from the Petitioner himself. Furthermore it was made patently clear to Petitioner in the exchange of communications leading up to the issuance of the subpoena herein (and requesting him to voluntarily provide the requested information) that "If Mr. Yorty is asserting the constitutional privilege against self-incrimination (and if that privilege has not been waived), the Committee will, of course, respect that privilege." (Letter to Mr. Phill Silver dated December 20, 1973 from C. Stephen Howard, Chief Counsel of the Governmental Efficiency Committee, which letter is found in File No. 146726 S-3, a part of Exhibit I to the Petition herein). Mr. Silver then replied by letter dated December 26, 1973 (a part of the hereinabove mentioned Exhibit I, File No. 146,726 S-3) that he was relying on the Fourth Amendment, not the Fifth Amendment,

and that "It is a Constitutional right to enjoy and defend one's privacy and to be left alone."

The Stevenson declaration further sets forth (paragraph 8) that when Petitioner refused to produce the requested documents and to testify relative thereto, it requested the Council to subpoena same, and that the subpoena was duly authorized, issued and served (paragraphs 9 and 10).

Petitioner then filed an action in the Superior Court (Appendix A to the Petition to the Court of Appeal) seeking to permanently enjoin the City Council from enforcing such subpoena, and requested a preliminary injunction against such enforcement pending the trial thereof (Appendix F to the Petition to the Court of Appeal).

At the hearing before the Honorable Campbell Lucas, Judge of the Los Angeles County Superior Court, relative to such request for preliminary injunction, Real Party in Interest herein relied upon the facts set forth in the above described Declaration of Robert J. Stevenson, including the facts set forth in the Staff Memorandum attached as Exhibit C to the Stevenson decla-

ration, which facts Mr. Stevenson declared (paragraph 12) to be true. Petitioner on the hand relied only on the more generalized allegations of his Second Amended and Supplemental Complaint (as verified by his counsel).

After oral argument Judge Lucas ruled (28th unnumbered page, Reporter's Transcript of Proceedings, February 28, 1974) that one portion of the subpoena was "overly borad"; that there was no "violation of constitutional guarantees" by the remainder of such subpoena; and "that if there is a desire to raise the Fifth Amendment privilege which specifically has not been raised here, Mr. Yorty still has that opportunity at the further hearing before the Committee."

In so holding the trial court thus rejected Petitioner's Fourth Amendment objections to most of the subpoena in question, to the extent necessary for the ruling on the requested preliminary injunction.

It is submitted that the trial court acted reasonably in so holding; that the California Court of Appeal and Supreme Court properly acted in rejecting the Petitions for Writ of Mandate requested of them by Petitioner herein seeking, not simply to set aside the trial court ruling

on the preliminary injunction request, but to direct the Superior Court how to ultimately rule on the case itself, which it had not yet even tried.

QUESTIONS PRESENTED

Although we have had difficulty throughout these proceedings attempting to ascertain just what are the basic contentions of Petitioner herein, it would appear from the Petition now on file before this Honorable Court and from the three numbered arguments set forth therein that such contentions may be reduced to the following questions:

1. Must a municipal charter and ordinance, which provide for the issuance of a subpoena to procure testimony before a legislative committee, also expressly provide for "transactional immunity" and for judicial review of the subpoena in order to comply with the Fourth and Fourteenth Amendments to the United States Constitution?

2. May a motion to quash a subpoena or to permit the withholding of

evidence from a legislative committee be based upon allegations of noncompliance with the Fourth Amendment, separate and apart from the Fifth Amendment?

3. Does Section 930 of the California Evidence Code preclude the necessity of Petitioner complying with the subject subpoena?

We believe the first and third questions must be answered in the negative, and the second in the affirmative, as will be hereinafter discussed.

ARGUMENT

I

MUNICIPAL CHARTER AND ORDINANCE PROVISIONS AUTHORIZING THE ISSUANCE OF SUBPOENAS FOR PROCURING TESTIMONY BEFORE A LEGISLATIVE COMMITTEE NEED NOT EXPRESSLY PROVIDE THEREIN FOR "TRANSACTIONAL IMMUNITY" AND FOR JUDICIAL REVIEW OF THE SUBPOENA IN ORDER TO COMPLY WITH THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner herein, in urging the affirmative of the above proposition (Petition, pages 15-19), cites us to no authority whatsoever in support thereof.

We concede that neither the City Charter nor the City ordinance supportive thereof provide "that any witness called to testify shall be given immunity against criminal prosecution." (Petition, pages 15 and 16) No statute of which we are aware ever provides such broad immunity, nor need it! In the event that Petitioner herein (or any one else) should claim in the ongoing (or other) legislative hearings that the testimony he is asked to give may tend to incriminate him, then he need not

further respond unless he is granted immunity from any prosecution that may result, directly or indirectly, from such testimony. The authority to grant such immunity, the extent thereof and, indeed, whether it is even desired to grant same are not in issue in the present proceeding until such time as a witness claims the Fifth Amendment privilege and it is then sought to compel him to testify.

The so-called doctrine of "transactional immunity" referred to by Petitioner herein (Petition, page 15) was devised as protection pursuant to the Fifth, not the Fourth, Amendment and Petitioner explicitly disclaims any Fifth Amendment protection herein. Such doctrine finds its roots in the case of Counselman v. Hitchcock (1892) 142 U.S. 547 (cited in the Petition herein at page 18), and in the immunity bill introduced in Congress 16 days later granting "transactional immunity," as was then thought necessary. (See Kastigar v. United States (1972) 406 U.S. 441, 449 - 451, wherein such doctrine was discussed at length and was held to be unnecessarily broad and beyond the requirements of the

Fifth Amendment). The doctrine of "use immunity" was specifically declared in Kastigar to be broad enough to meet Fifth Amendment requirements, the court stating at pages 454 and 455:

> "The broad language in Counselman ... was unnecessary to the Court's decision, and cannot be considered binding authority."

Petitioner's argument under the title of "transactional immunity" (Petition, page 15) in fact takes more the form of some contention by Petitioner that the City ordinance imposing penalties for violating a subpoena is invalid because such ordinance itself does not expressly provide for judicial review of the propriety of such subpoena (Petition, pages 17 and 18). In support of such proposition Petitioner at page 17 cites and quotes from Jones v. S.E.C. (1935) 298 U.S. 1, 27, which simply held (page 25) that since the purpose of the investigation there involved (whether to issue a stop order) had ended by the withdrawal of the application for registration, there was no longer any need to compel testimony with respect thereto. In this

setting the court stated as set forth at page 17 of the Petition that an investigation must be for a proper purpose and a subpoena in aid thereof cannot simply be a general roving investigation. Such case does not stand for the proposition for which Petitioner cites it.

In actual fact the very thing for which Petitioner contends herein, i.e., a judicial review of whether a particular subpoena violates any constitutional privileges, has been afforded to Petitioner. Not only has the Los Angeles County Superior Court considered and partially granted and partially denied Petitioner's requested relief in passing upon the request for preliminary injunction, but Petitioner can further urge such contentions before the courts when (1) the Superior Court actually tries Petitioner's complaint for a permanent injunction, or (2) when (and if) the City Council should direct that misdemeanor charges be filed against Petitioner for failing to obey such subpoena. Again, Petitioner cites us to no authority to support his assertion that the ordinance which provides for a misdemeanor penalty for noncompliance

with a subpoena must itself provide for a judicial review thereof. Such judicial review is obviously afforded by our Constitution and our basic form of government, together with supportive statutes, establishing the judiciary and empowering it to act.

At page 18 of his Petition herein, Petitioner asserts that "the City Council authority to conduct investigations . . . is subject to the constitutional and statutory privileges accorded witnesses or prospective defendants," citing United States v. Boyd (1886) 116 U.S. 616; Counselman v. Hitchcock (1891) 142 U.S. 547; and McCarthy v. Arndstein (1924) 266 U.S. 34, 40. We have no argument with such proposition so long as it is understood that we are dealing with "prospective defendants" only if the investigation being conducted is an accusatory one. Note that the Counselman and McCarthy cases involved only the Fifth Amendment (which Petitioner herein specifically is not relying upon - Petition, page 25). The Boyd case involved an action to forfeit a person's property. The court at page 634 said that such proceedings,

"though they may be civil in form, are in their nature criminal." The court thus held that the documents were being unreasonably demanded under the Fourth Amendment because they were intended for use in such forfeiture proceedings, in violation of the individual's Fifth Amendment rights. (Again, Petitioner is not claiming any Fifth Amendment rights herein).

It is submitted that Petitioner's claims that "transactional immunity" and judicial review must be expressly provided for in the charter and ordinance provisions authorizing the issuance of subpoenas in connection with a legislative investigation, are without support and form no basis for his request for the issuance of a Writ of Certiorari herein.

II

A MOTION TO QUASH A SUBPOENA OR TO PERMIT THE WITHHOLDING OF EVIDENCE FROM A LEGISLATIVE COMMITTEE MAY BE BASED UPON ALLEGATIONS OF NONCOMPLIANCE WITH THE FOURTH AMENDMENT, SEPARATE AND APART FROM THE FIFTH AMENDMENT

We have no disagreement with the general proposition set forth in the heading of Petitioner's arguments II and III in his Petition herein (Petition, pages 19 and 21). (We must admit, however, that we do not understand the relevancy to the present proceedings of the Petition reference to the First Amendment in such headings) We agree that the Fourth Amendment may be urged, separate and apart from the Fifth Amendment, in opposition to the production of subpoenaed testimony and documents. In such instances, however, such opposition must take the form of showing wherein the subpoena constitutes an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

One point must be made clear, however. It is stated at page 25 of the Petition herein that "The Trial Judge determined

that the Fourth Amendment could not be invoked by the petitioner." Such simply is not the fact. At the 23rd unnumbered page of the transcript of the February 28, 1974 hearing (a part of Exhibit II to the Petition herein) counsel for the City Council stated "Mr. Silver has properly isolated the legal question, which is whether the subpoena duces tecum constituted an unreasonable search and seizure of Mr. Yorty and whether the specifications in the subpoena are unreasonable." The trial court not only recognized the effect of the Fourth Amendment but invoked same when he commented (24th unnumbered page) that one portion of the subpoena appeared to be "an extremely broad demand," referred to the subject hearing as one "to review the subpoena, to determine whether or not the subpoena in whole or in part was objectionable" (28th unnumbered page), and then granted an injunction against enforcing that portion of the subpoena which he found to be "overly broad" (28th and 29th unnumbered pages).

While the case of Mancusi v. De Forte (1968) 392 U.S. 364, cited in the Petition at page 19, does support the proposition

that the Fourth Amendment protects against illegal seizures, it does not appear relevant to the facts here involved. In the Mancusi case certain documents were subpoenaed, but their production was refused. State officials then physically seized such documents from the labor union office where they were kept and subsequently used them against a labor union official at his criminal trial. The only question involved was the reasonableness of the search under the Fourth Amendment. The Fifth Amendment was not in issue. The court there held that the seizure of the documents without a proper search warrant was unreasonable, and that the subpoena did not take the place thereof.

Likewise the cases of Mapp v. Ohio (1961) 367 U.S. 643, and Schmerber v. California (1966) 384 U.S. 757, cited in the Petition at page 20, dealt with the reasonableness of search and seizures and involved Fourth Amendment matters. They did not involve subpoenaed evidence.

In the case here presented the relevancy and materiality of the documents sought to be subpoenaed is clearly shown

by the Declaration of Robert J. Stevenson (a portion of Exhibit I to the Petition herein) and by the facts set forth in the Staff Memorandum attached as Exhibit C to the Stevenson Declaration. Such factual declarations are unrefuted herein. Counsel for Petitioner instead quotes from his own earlier assertion (Petition, pages 6 and 7) that "under the Fourth Amendment, neither an enforcement officer nor a City Council Committee, may invade the privacy of an individual. It is a Constitutional right to enjoy and defend one's privacy and to be left alone." It is thus apparently Petitioner's position, unsupported by any authority cited by him thus far, that he has some absolute right of "privacy and to be left alone" under the Fourth Amendment, and to thus be able to withhold the production of subpoenaed documents and testimony whenever he so chooses, no matter how relevant and material they may be.

It is submitted that the sheer statement of the foregoing proposition reveals its own absurdity. Such a proposition would wipe out all powers of subpoena: legislative, administrative and judicial.

We see no line (as Petitioner apparently does) that can be drawn between judicial subpoenas on the one hand and non-judicial subpoenas on the other to support Petitioner's contention.

It is not a Fourth Amendment privilege to be able to avoid all invasions into one's privacy. Rather such amendment protects only against an unreasonable invasion thereof. Thus in Schmerber v. California, supra, at page 767, it is stated:

> "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." (Emphasis added)

The Superior Court in denying, for the most part, Petitioner's request for a preliminary injunction has made a determination on the facts of the relevancy and materiality of that which is sought by the subject subpoena. The California appellate courts have refused to interfere with such proceedings. Petitioner now somehow contends that the Fourth Amendment gives him some absolute right to be "left alone" and

to refuse to comply with the subject subpoena. Such contention, we submit, should be rejected.

At page 21 of the Petition herein, Petitioner states "In Gebhard v. United States, 409 U.S. 41, the Supreme Court said," and then sets forth a quotation supporting the hereinabove discussed proposition that the Fourth Amendment may be used as a basis for quashing a subpoena, with which proposition we do not disagree. It should be recognized, however, that the name of the case is actually Gelbard v. United States; the citation is actually 408 U.S. 41; and the quotation is actually from the concurring opinion of one Justice, not from the majority opinion.

As a final case in support of his position herein Petitioner cites and quotes from the case of Schwimmer v. United States of America (8th Cir. 1956) 232 F.2d 855. (Petition, pages 26 and 27). Such case involved a motion to quash two subpoenas issued to aid in a grand jury investigation. One of the subpoenas was of "unlimited scope" and called for the production before the grand jury of all books, records and

other documents belonging to Mr. Schwimmer which were kept in a designated storage location. The second subpoena "of restricted reach" called for the production of all books, records and other documents of Mr. Schwimmer in such storage location that pertained to the affairs of three named parties during a period of about 10 years. Petitioner refers to the District Court ruling which held both of the subpoenas to be reasonable and then states at page 26 of the Petition "In reversing the Order of the District Court, the Circuit Court said:", and then quotes a portion of such decision to the effect that it is just as much an unreasonable search and seizure, and hence violative of the Fourth Amendment, to procure one's documents by subpoena duces tecum as it is to secure them by warrant <u>if</u> the purpose is to use them against the person in a criminal proceeding. While such is of course a correct statement of the law, Petitioner <u>fails</u> to make clear that the Circuit Court only reversed the District Court <u>in part</u>, quashing the first of the subpoenas as too general in scope, but <u>upholding</u> the second as being sufficiently specific. The court

therein stated at pages 862 and 863:

> ". . . a grand jury has no catalog of what books and papers exist and are involved in a situation with which it is attempting to deal, nor will it ordinarily have any basis for knowing what their character or contents immediately are. It can therefore hardly be expected to be able to designate or call for what its exact needs may ultimately turn out to be. And since the path which it is entitled to travel in its search for probable cause has no general limits except those of reasonableness on the entirety of the situation being pursued, it obviously has a right, as against the objection of unreasonable search and seizure, to a fair margin of reach and material in seeking information, not merely direct but also as a matter of possible light on seemingly related aspects whose significance it is seeking to uncover.

Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury.

"In the present situation, we do not believe that the scope of the second subpoena can be said to have involved an unreasonable margin of reach as to either material, parties or time, in respect to the investigation of Schwimmer's handling of the affairs of Sachs, Schu-Stiles, Inc., and Mrs. Taylor."

It is submitted that the scope of a legislative investigation and of permissible subpoenas thereunder is at least as broad as that of a grand jury and, in keeping with the court ruling in the Schwimmer case, the subpoena here in question is proper, no violation of the Fourth Amendment has been shown and the requested writ should be denied.

III

SECTION 930 OF THE CALIFORNIA EVIDENCE CODE IS INAPPLICABLE TO THE PRESENT SITUATION

The Petitioner herein at pages 4 and 28 of the Petition urges California Evidence Code §930, as a bar to his being called as a witness in the present legislative hearing. Petitioner thus states at page 28: "Section 930 of the Evidence Code of California is applicable to a witness subpoenaed to appear before a Councilmanic Committee investigating alleged violations by the witness of conflict of interest and/or election laws". In support of such assertion Petitioner cites only the case of State v. Nolan, et al (1950 - Minn.) 44 N.W.2d 66. Such case is not in point. In the Nolan case a public examiner was investigating a particular transaction between a company (of which defendants were officers and principal stockholders) and a Minnesota city "to ascertain whether there was a bribe given to the Mayor of the city in connection with the sale of a truck to the city by that company." (pages 68 and 69). Defendants had been subpoenaed to

testify before such examiner and they "had informed the public examiner that they were 'standing on their constitutional rights and refusing to testify' on the ground that their testimony would tend to incriminate them." They ultimately testified under the compulsion of the examiner and were subsequently charged with perjury as a result thereof. The court held that notwithstanding the compelled nature of the testimony this gave no basis for falsely testifying and hence such prosecution could proceed.

Note that in the Nolan case, unlike the case now before this Court, the investigation was one to discover whether a crime had been committed and the witnesses sought to refuse to testify on self-incrimination (Fifth Amendment) grounds.

Moreover, Evidence Code §930 provides as follows:

> "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not

to be called as a witness and not to testify." (Emphasis added)

At the outset it appears obvious that the interpretation of such statutory provision is for the California Courts and raises no Federal constitutional question.

In addition, however, it likewise seems apparent that such provision is wholly inapplicable to the present proceedings. Neither is the ongoing legislative investigation "a criminal case" nor is Petitioner "a defendant" therein.

Petitioner cites no authority holding that a person called to testify and produce documents in a legislative hearing may simply declare such to be a criminal proceeding and himself the defendant and then ignore subpoenas that might be issued with respect thereto, all without asserting a claim of privilege against self-incrimination. Certainly such was not the holding of the Nolan case, hereinabove discussed. In fact the Nolan court clearly recognized the necessity of a witness (who is not "an accused") to appear and individually object to the questions posed. Thus the court

stated on page 70:

> "The accused may not be required to be a witness against himself. A person who is a witness only must object to answering each question on the ground that the answer will tend to incriminate him."

No mention is made in the Petition herein of the two central decisions of the United States Supreme Court that indicate when a legislative investigation is criminal in nature so as to involve the question of an individual's Fifth Amendment rights. A consideration of Hannah v. Larche (1960) 363 U.S. 420, and Jenkins v. McKeithen (1969) 395 U.S. 411, will demonstrate that the City's investigation is not criminal in nature and does not violate any of the rights that Petitioner could assert in a criminal proceeding.

In Hannah v. Larche, supra, persons subpoenaed before a federal commission requested the right to confront and cross-examine witnesses, a right allegedly guaranteed to them under the Due Process Clause

of the Fifth Amendment. In rejecting the challenge to the commission's procedures, the Supreme Court placed great emphasis on the investigatory functions of the commission and stated:

> "[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action." 363 U.S. at 441.

This description is perfectly applicable to the investigation conducted by the City's Governmental Efficiency Committee.

Its purpose is not to determine anyone's civil or criminal liability, but only to find facts as the basis for subsequent legislative action. Therefore, Petitioner's attempt to assert in this context rights which would protect him from being called in a criminal proceeding is inappropriate. This investigation is not a criminal proceeding.

By contrast, in Jenkins v. McKeithen, supra, the Court held that a cause of action was stated by a complaint challenging the procedures of a state investigative commission. The statutory purpose of the commission was "the investigation and findings of facts relating to violations or possible violations of criminal laws of the State of Louisiana or of the United States arising out of or in connection with matters in the field of labor-management relations. . . ." 395 U.S. at 413. Furthermore, the state commission was required to determine, in public findings, whether there was probable cause to believe violations of the criminal laws had occurred. The commission was further instructed to request the Governor to refer matters to

the state attorney general asking the latter to exercise his authority to cause criminal prosecutions to be instituted. 395 U.S. at 417.

There was no right of any witness to cross-examine any other witness, and a limited right to present evidence.

On the basis of these facts, the Supreme Court concluded that the commission clearly exercised an "accusatory function," namely, to find that certain persons were or were not guilty of unlawful conduct. Because of the deprivation of the right of confrontation and cross-examination, and because of the limitation of the right of any witness to present evidence on his own behalf, the Court ordered the trial court to try the case and determine whether the procedures of the commission, in light of its express accusatory function, met constitutional standards.

There is nothing in the investigation being conducted by the City that is accusatory in nature. The Committee has not been instructed to discover or report criminal activity, nor has the scope of the investigation, which is now completed except for

Petitioner's non-compliance with the challenged subpoena, exceeded the boundaries appropriate to legislative fact-finding. Petitioner has failed to demonstrate to the contrary.

CONCLUSION

It is respectfully submitted that the charter and supportive ordinance of the City of Los Angeles are not violative of the Fourth or Fourteenth Amendments to the United States Constitution in not expressly providing therein for (1) immunity from prosecution for all witnesses subpoenaed to testify in the course of a legislative inquiry, or (2) judicial review of the refusal of a witness to testify or produce documents pursuant to subpoena prior to initiating action in court to punish for such refusal; that Petitioner herein has cited no authority in support of his contentions to the contrary; that a witness subpoenaed to testify and produce documents before a legislative body may urge the Fourth Amendment in opposition thereto if that which is sought is not adequately described, is not relevant and material to

the proceedings, or if such constitutes an unreasonable demand (as for the production of documents to be used in a criminal proceeding against him); that Petitioner has set forth no facts in support of any of these premises.

For the foregoing reasons it is submitted that no federal question of substance has been decided by the state courts herein which has not heretofore been determined by this Court or in a way not in accord with applicable decisions of this Court, within the contemplation of Supreme Court Rule No. 19. It is therefore urged that the Petition for Writ of Certiorari herein be denied.

Respectfully submitted,

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